

INDEPENDENT CABLE & TELECOMMUNICATIONS ASSOCIATION

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July 23, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, NW
Washington, DC 20554

RE: Annual Assessment of the Status of Competition in Markets for the
Delivery of Video Programming CS Docket No. 97-141

Dear Mr. Caton:

Enclosed are an original and 4 copies of the comments of the Independent Cable & Telecommunications Association for filing in the above-referenced proceedings.

Please file-stamp the marked copy and return it to my office with the messenger.

Thank you for your assistance with this matter. If you have any questions, please do not hesitate to contact me at (202) 364-0882.

Sincerely,


Brenda S. O'Connor

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Annual Assessment of the Status of
Competition in Markets for the
Delivery of Video Programming

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CS Docket No. 97-141

TO: The Commission

**COMMENTS OF
INDEPENDENT CABLE & TELECOMMUNICATIONS ASSOCIATION
(ICTA)**

**INDEPENDENT CABLE &
TELECOMMUNICATIONS ASSOCIATION**

By: William J. Burhop
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5335 Wisconsin Avenue, NW, # 750
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Dated: July 23, 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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To: The Commission

**COMMENTS OF
INDEPENDENT CABLE & TELECOMMUNICATIONS ASSOCIATION
(ICTA)**

The Independent Cable & Telecommunications Association ("ICTA"), submits these comments in response to the Notice of Inquiry ("NOI") in the above-referenced proceeding.

ICTA is a trade and service association. Its members include private cable and telephony operators, property owners and managers, vendors of cable and telephone equipment, programmers and others who want private, alternative service providers to succeed. The private cable and telephone industry has hundreds of small and medium size companies all across the country that offer state-of-the-art technology, service tailored for individual customers and price competition for the large franchise cable and telephone companies. The private cable and telephony industry focuses on multiple dwelling units ("MDU"s) including apartments, condominiums, cooperatives, planned unit developments ("PUD"s), college campuses, hotels/motels, prisons, etc.

In the NOI, the Commission has asked for comment on a wide range of subjects relating to the multichannel video programming distribution ("MVPD") market, including the extent to which there is competition in the provision of MVPD services to MDUs and the need for changes to the Commission's rules in order to best implement the provisions of the Telecommunications Act of 1996.

Private, alternative video and telephony operators offer services and prices that are very attractive to MDU owners and tenants. Given that there are approximately 28 million MDU units which represent over a quarter of the total population in the United States, private operators have a tremendous growth potential. If this potential can be maximized it will be beneficial for the MDU owners and residents, plus it will help in the achievement of the goals sought by Congress and the FCC in the Telecom Act of 1996 and its implementing regulations. These comments focus on several barriers which the Act sought to reduce or remove but which continue to preclude or limit the opportunities of the private, alternative providers. Elimination of these barriers will enhance competition for the benefit of ICTA members and consumers.

The ability of the Commission to remove these barriers and promote an environment in which competition for telecommunications services to MDUs can flourish will, in large part, determine the success of the current efforts to break the monopolies held by service providers at the local level.

LECs Are Not Yet a Competitive Force in the Market

As the Commission, the Department of Justice, and the courts have found, the present market for MVPD programming services remains highly concentrated and the pro-competitive impact of the 1996 Act is yet to be felt. The one segment of the

market that has witnessed a significant increase in the level of competition in recent years, however, is the market for video services to MDUs. Not coincidentally, this is the only segment of the market that, until the passage of the 1996 Act, private cable operators were permitted to serve.

In the 1996 Act, Congress sought to break the franchise cable monopoly. One means of doing so, it determined, was to unleash the local telephone companies, which are monopolists in the local exchange market, into the MVPD market. To that end Congress eliminated the cable-telco cross-ownership ban and opened the way for local exchange carriers to provide multichannel video programming service directly to subscribers in any of four ways: As a franchised cable operator under Title IV; through radio communication under Title III (e.g., MMDS); as a common carrier video transporter under Title II; or by means of an open video system under new Section 653.

In conjunction with this pro-competitive approach, Congress included provisions in the 1996 Act that would exempt franchised cable operators from most rate regulation once they face "effective competition" from an LEC-affiliated video programming provider. The Congressional vision was of two well-capitalized monopolists grappling for subscribers in each community, each having a strong preexisting client base. It was hoped that these two behemoths would check one another's ability to price in anticompetitive ways and that other providers would emerge in the process to create a fully competitive market.

As the Commission knows, that vision remains but a vision. LEC forays into the MVPD market thus far have been sporadic, widely dispersed, and quickly aborted. Although there was expectation that the LECs will one day be a competitive force in the MVPD market, that day has not arrived. Meanwhile, regulation of

franchised operators' rates remains essential for the protection of new entrants seeking to gain access in the market. Further, the vision is least likely to be realized in the MDU marketplace.

In this regard, ICTA has urged the Commission to require that a cable operator claiming to face "effective competition" from an LEC-affiliated provider affirmatively demonstrate that the availability of the LEC provider's programming actually is having a restraining effect on cable rates. One administratively-efficient means of doing so would be to establish a test, resembling the absolute subscriber pass and subscription rates applicable under the other "effective competition" provisions of the 1996 Act, for determining the point at which a LEC-affiliated programming distributor is providing effective competition to a franchised operator.

For instance, the Commission could use some relative measure of service availability and subscriber access. Such a test for effective competition would not turn upon some non-statutory absolute pass rate for the LEC-affiliated provider, but it would ensure that the LEC-affiliated entity could provide a real check on the competitive practices of the franchised operator seeking to escape rate regulation.

If the Commission frees franchised cable operators from rate regulation prior to the time that they face actual effective competition, the franchised operators will target price discounts in areas in which new competitors are seeking to compete. Indeed, the mere threat that they may do so is sufficient to discourage many would-be competitors from entering the market. A clear, "effective competition" test is essential to the fulfillment of the Congress' competitive vision.

Positive Private Alternative

In response to market demand, alternative video programming providers have begun to emerge in the MVPD markets. Most importantly, private cable operators have developed enhanced SMATV-like systems, some using microwave frequencies to link widely separated MDUs, which can provide service superior to that of franchised cable operators at attractive rates. Because of the nature of these systems, however, and the need to recover costs within a ten year period, private cable companies provide service primarily to MDUs and private communities where high concentrations of potential subscribers reside. In essence, each private cable system is a self-contained cable system for the individual property being served. By providing service on an MDU-by-MDU basis, private cable operators can provide programming tailored to the needs of their subscribers and the MDUs in which they live. Further, because these private cable systems generally have on-site managers, they can offer to their subscribers enhanced customer service capabilities.

As a result of the competitive and in many cases superior service and programming offered by private cable systems, private cable operators have experienced a rapid increase in demand for their services. Once one MDU begins to offer the high-end MVPD services that are provided by private cable operators, other local MDU managers and homeowner associations seek out similar services. Thus, while most local video distribution markets remain monopolistic, the MDU market is one of the most highly competitive segments of the larger MVPD market.

Indeed, it is the one segment of the MVPD market in which competition is helping to drive down prices and spur product and service development. Despite the promise held-out by the 1996 Act, there is no more competition today in the general MVPD market than there was eighteen months ago. The telephone companies largely have abandoned their plans to enter the MVPD markets and most of the

franchised cable companies have backed off of their promises to provide “full service” cable/telephone networks. The only segment of the MVPD market in which competition is king is the MDU market. Unfortunately, large franchised cable interests are making every effort to subvert competition in this niche of the market.

The Use of Perpetual Contracts by Franchised Cable Operators Forecloses MDUs to New Entrants and Inhibits the Growth of Competition

In the NOI, the Commission has asked the industry to comment on various issues surrounding property owners having, in the past, granted access rights (frequently on an exclusive basis) to provide video programming services to MDUs by cable companies where such rights have become virtually perpetual. It has raised the matter of mandating access to MDU residents to all who wish it. Implicit in this proposal is a model of competition in which large, well-capitalized telecommunications companies might overbuild one another within the same MDU property. That model is most consistent with a duopoly consisting of the incumbent cable and telephone monopolies.

ICTA believes the perpetual nature of contracts, not their exclusivity, hampers the development of competition with cable operators. First, the capital costs involved will make significant overbuilding unlikely within discrete MDU properties. Second, while the LEC's are now discussing providing one-stop access to cable and telephone services, the private cable industry is already providing one-stop access to these and other services. Private cable operators are able to provide these services because of the time-limited exclusivity that the owner grants.

ICTA Strongly Recommends That the Commission Preclude Contracts Specifying a Duration Linked to the Franchise and All Renewals or Extensions

To protect and promote competition in the market for the delivery of video programming services, ICTA strongly urges the Commission to prohibit service agreements between franchise cable operators and property owners that specify a duration linked to the length of the operator's franchise and any renewals or extensions, or that have similar language. Agreements utilizing this language constitute "perpetual contracts" because their terms dictate that they will or may remain in effect forever. The potentially infinite duration of these contracts deters and often prevents alternative providers from ever competing to serve the property.

When a service agreement provides that it will continue for "the duration for the franchise and any renewals of the franchise," or words to that effect, it undoubtedly will extend in perpetuity given that it is exceedingly rare for a franchise not to be renewed. Property owners are often unaware that this language will result in a perpetual contract because they may lack knowledge of the regularity with which franchises are renewed. Furthermore, the agreements are typically transferable to "successors and assigns." Accordingly, as the franchise is continually renewed and/or the rights for the franchised operator are continually transferred to a successor, the property owner is effectively locked into the agreement in perpetuity.

The practical result of this type of service agreement is that the owner's and consequently the tenant's choice of provider is restricted forever. If the contract contains an exclusivity provision, the property owner simply cannot ever contract with an alternative provider without violating the agreement. Even if the agreement does not contain an exclusivity provision, it may simply not be economically feasible for another operator to provide service to the property in tandem with the franchised operator. In either situation, there may never be alternative providers even seeking to

serve the property. These contracts cannot be justified based upon business necessities such as the need to recover costs. The terms of these perpetual contracts extend well beyond the period necessary for the cable operator to recoup its investment.

For these reasons, ICTA recommends that the Commission prohibit franchised cable operators from locking property owners into perpetual service agreements linked to the term of the operator's franchise and all renewals or extensions thereof. ICTA believes that the Commission should mandate that all future service agreements between franchised operators and property owners include a durational provision that states that the agreement will remain in effect for a specific term of years. In this way, property owners will have clear notice of the effective duration of the agreement and not unknowingly restrict their choice of provider in perpetuity. This will also ensure that the market is invigorated at regular intervals by alternative providers attempting to win away properties served by incumbent franchised operators.

Although a mandatory access requirement would eliminate perpetual contracts, it also would sweep in a wide variety of pro-competitive, non-perpetual exclusive contracts. Consequently, ICTA suggests that, rather than impose a mandatory access regime, the Commission should apply a "fresh look" policy to those perpetual contracts that are now in effect and then allow parties to contract as they see fit in response to consumer demands and needs in the marketplace.

Fresh Look

The Commission previously has imposed "fresh look" obligations on dominant telecommunications providers to prevent them from using their market power in anticompetitive ways. "Fresh Look" allows customers committed to contracts with a dominant provider to take a "fresh look" at the marketplace once competition is

introduced and to escape or renegotiate those contracts if they so desire. This approach “makes it easier for an incumbent provider’s established customers to consider taking service from a new entrant .. [and] obtain...the benefits of the new, more competitive ... environment¹.”

In this case, the Commission, the Department of Justice, and the courts have found that franchised cable operators are the dominant providers in the MVPD market. The existence of perpetual contracts allows franchised cable operators to maintain their dominant position, particularly because most private cable operators, daunted by the capital costs, do not even attempt to compete for MDUs that are bound up in perpetual contracts. There will not be significant competition in the MDU market until the barrier to entry represented by perpetual contracts is eliminated.

As in previous instances in which the “fresh look” doctrine has been applied, the customers of dominant service providers should be given a fixed period of time within which to opt-out of their contracts.² The characteristics of the MVPD marketplace require that the “fresh look” window in this case should be at least 180 days. In the MVPD market, it may take a new entrant several months to obtain necessary approvals and construct the facilities needed to serve any given MDU.

¹Expanded Interconnection with Local Tel.Co. Facilities, 9 FCC Rcd. 5154, 5207 (1994).

²In Competition in the Interstate Interexchange Marketplace, the Commission determined that a ninety-day “fresh look” period was sufficient for long-distance customers to evaluate their options and negotiate new contracts when 800 numbers became portable. See 6 FCC Rcd. at 5906. When the Commission later confronted expanded interconnection to local exchange facilities, it provided for a 180-day “fresh look” window, recognizing that it would take longer than ninety days for the market to respond to expanded interconnection opportunities., See 8 FCC Rcd. at 7353 & n.48..

ICTA believes that it would be most appropriate that the effect of a decision of an MDU owner to terminate a long-standing cable company perpetual contract be that the termination take effect after 90 days, or less at the owner's option. This will allow the incoming competitor enough time to build out its system and effect a smooth cutover of service.

Finally, the fact that franchised cable operators hold a series of dispersed monopolies rather than a single national monopoly requires that the "fresh look" window be tailored to the local MVPD markets. MDU owners and ownership associations must be freed from their perpetual contracts in order to create competition in each locality.

Prior to the time when a franchised cable operator is subject to "effective competition" under Section 623 of the Communications Act, the "fresh look" window should be "opened" at any given MDU upon the request of a private, alternative cable company able to serve the MDU in question. Moreover, once a franchised cable operator has been found subject to "effective competition", even in the absence of a prior request, the six month "fresh look" window should begin. During the "fresh look" period, the property owner or ownership association should renegotiate or terminate its contract with the franchised cable operator free from contractual penalties or breach of contract litigation.

Application of the "fresh look" doctrine will allow the Commission to cease to regulate in this area entirely once there is actual or "effective" competition. At that point, MDU owners and ownership associations that enter into disadvantageous service contracts for their buildings do so, presumably, with full knowledge that competitive alternatives exist. The residential real estate industry and associations of condominium owners will self-regulate against such errors.

As a result of the cable companies' propensity to sign multiple types of agreements to document its business arrangements with MDU owners, ICTA proposes that the "fresh look" apply to all relevant documents and agreements.

The Uniform Rate Requirements Must Be Implemented in a Manner That Will Provide Meaningful Protection Against Anticompetitive Practices

One of the most important aspects of cable rate regulation, at least for purposes of preserving a level competitive field, is the uniform rate requirement of Section 623(d) of the Communications Act. As the Commission itself has recognized, the uniform rate requirements prevent cable operators from undercutting potential competitors by offering lower rates only in areas when competitors seek to offer a competing service.

In the 1996 Act, Congress modified, but did not eliminate, the uniform rate requirements. Most importantly, new Section 623(d) provides that bulk discounts to MDUs are exempt from the requirement, except that bulk discounts that are "predatory" are prohibited. In its implementation of Section 623(d), the Commission is presented with a clear choice between rules that will promote competition and rules that will allow the dominant MVPD service provider to eliminate nascent competition.

For instance, because the scope of the Commission's definition of "bulk discounts" will determine the extent to which cable operators may escape this important competitive check and target discounts discriminatorily to consumers who have competitive choices, it is critical that the Commission's rules confine the exemption to include only those situations in which a bulk payment is paid by a property owner or other responsible agent on behalf of all the residents of an MDU. Bulk discounts offered on an individual subscriber basis are not true discounts, but

rather are targeted discriminatory per subscriber discounts subsidized by the single family home market still largely monopolized by the franchise industry.

Similarly, if the uniform rate provisions are to mean anything in the MDU context, the Commission's implementing rules must interpret the predatory pricing restriction broadly enough to encompass all pricing that is targeted at driving a competitor from the market. For this reason ICTA has suggested that, for purposes of enforcing Section 623(d), the FCC should establish a definitive threshold above which pricing conduct would be conclusively presumed predatory. Such discounts, it can be assumed, are offered only to eliminate incipient competition in a particular MDU or geographic region.

Leased Fiber Without Franchise Would Enhance Competition

The state of competition in the video services market at MDU's will be greatly impacted by the Commission's decision in *In re Motion of Entertainment Connections, Inc. and Telecommunication Services Corporation for Declaratory Ruling Regarding the Applicability of Section 621 of the Cable Communications Policy Act of 1984, as amended by the Telecommunications Act of 1996* (the "Motion for Declaratory Ruling"). In the Motion for Declaratory Ruling, the petitioners are private cable operators that either subscribe or intend to subscribe to a service offered by common carriers whereby the signal carrying the video programming provided by petitioners to their subscribers runs through the common carrier's facilities before connecting to the petitioners' facilities inside the private property line. The petitioners seek a ruling that they do not need to obtain a franchise under Section 621 because, among other things, petitioners only control and own facilities located solely on private property. The petitioners further assert that Section 651(a)(2) contemplates the type of service they are or will be providing.

A ruling in favor of petitioners will enhance competition whereas a contrary finding will inhibit it. For many private operators, if they cannot use the common carrier service they must place a separate headend at each MDU to provide the 60 to 70 channels of programming that are often necessary to compete with franchised operators. Separate headends for entities such as petitioners are often only cost effective when they serve MDUs of approximately 400 units or more. Therefore, if the Commission rules against petitioners many private cable operators will cease providing service to smaller MDUs, which will only strengthen the monopoly or near monopoly position that franchised cable operators already have in the MDU market.

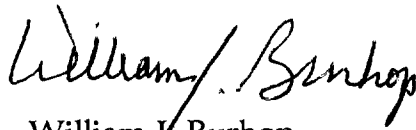
Local Franchising, Zoning and Antenna Siting Restrictions Inhibit the Development of Radio-backed Competitors to Franchised Cable

Local zoning restrictions on microwave and telecommunications equipment also serve as a barrier to entry into this market. Numerous, local jurisdictions throughout the U.S. have imposed antenna siting moratoria or otherwise restricted the installation and construction of new antennae. As a result, communications networks that would support more widely dispersed and cost-effective competitive cable systems cannot be built. To ensure continued access to necessary antenna siting locations, the Commission should, therefore, expand the scope of federal antenna preemption doctrines to include microwave, or other, antennae used to deliver video programming.

Similarly, local franchising requirements have been used to keep competitors out of the MVPD markets. Numerous local jurisdictions have voiced a concern that the growth of competition to the franchised cable operators will lead to a reduction in the franchise fees payable to the jurisdiction. As a result, and despite the clear federal policy governing in this area, many local jurisdictions have attempted to impose special fees or taxes on new providers of video services to make up for lost franchise

revenues. The Commission should stand ready to closely scrutinize local "fees" or "taxes" imposed on competitive video programming providers to ensure that it is not a pretext for an unlawful franchise fee.

Respectfully submitted,
ICTA

A handwritten signature in black ink, reading "William J. Burhop". The signature is written in a cursive, flowing style.

William J. Burhop
Executive Director

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